IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 391

A. F. WAGNER IRON WORKS and
WAGNER ENGINEERING CO.,

Petitioners,

vs.

WAR ASSETS ADMINISTRATION, ET AL., etc.

Respondents.

PETITION FOR CERTIORARI

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HARMER-SMITH-NORTHEVER CO.

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To the Honorable, the Supreme Court of the United States:

The petition of A. F. WAGNER IRON WORKS, and WAGNER ENGINEERING CO., Wisconsin corporations, respectfully shows to this court as follows:

STATEMENT OF THE MATTER INVOLVED

Petitioners seek a review of decree dated August 5th, 1948, by the United States Court of Appeals for the Seventh Circuit (herein termed "Court of Appeals"), dismissing plaintiffs' complaint, and affirming decision by the District Court of the United States, for the Northern

District of Illinois, Eastern Division (herein termed "District Court").

On May 18, 1948, plaintiffs filed an action in the District Court, against defendants, War Assets Administration, and its Chicago Regional Director and Deputy Regional Director.

The cause of action is in equity for specific performance of a contract. Briefly, the facts, as alleged in the complaint (R. 1-8), which stands unanswered, are as follows:

In June 1946, War Assets Administration agreed to sell, and plaintiffs agreed to buy, 5,000 tons of specific steel. In August 1946, War Assets Administration breached the contract by refusing to deliver any of that steel. Thereafter, War Assets Administration agreed to furnish 5,000 tons of substitute steel, but in October 1946, breached this agreement by refusing to deliver over 1500 tons of such substitute. (R 3-5) It is impossible for plaintiffs to obtain such steel elsewhere (R 5-6; also 12-16), and the failure of War Assets Administration to carry out its undertaking will cause plaintiffs irreparable injury. Plaintiffs pray specific performance and injunction to compel delivery of steel which Administration had on hand but proposed to divert elsewhere.

Defendants did not plead, but asserted that, because War Assets Administration is a government agency, no action on its contracts could be brought against such Administration in the District Court of the United States.

A temporary restraining order was issued by the District Court on May 18, 1948. On May 25, 1948, the District Court denied motion by plaintiffs for preliminary injunction and vacated the restraining order (R 17-18).

On May 25, 1948, plaintiffs appealed to the Court of Appeals. On May 28th, the matter was argued; on May 29th, motion for an injunction pending the appeal was denied; and on August 5th, 1948, decree was entered in the Court of Appeals holding that

> "defendant, War Assets Administration, is an agency of the United States and that, accordingly, defendants are not suable on the cause of action asserted herein in the District Court, and the District Court did not have and this Court does not have jurisdiction of this cause";

and directing that

> "the cause be remanded with direction to dismiss the complaint." (R 27, 28)

The matter in controversy exceeds $3,000. There is diversity of citizenship; plaintiffs are Wisconsin corporations; and defendants Director and Regional Director are citizens of Illinois. The case arises under the laws of the United States, including 50 USCA, App., Sec. 1611-1646, as amended.

Federal Surplus Property Disposal Agencies (1944-1948)

Since 1944 the United States Government has disposed of surplus goods through various Government agencies, "corporate" and otherwise. In March 1946, and for more than two years prior (from February 1944 to March 1946), the Government's principal disposal agencies were *expressly* suable. These agencies were Reconstruction Finance Corporation and War Assets Corporation. Reconstruction Finance Corporation was directly made suable by Act of Congress in 1932 (p. 24, addendum). War Assets Corporation (originally Petroleum Reserves Corporation) was made expressly suable by its Charter

from Reconstruction Finance Corporation in 1943 (p. 24, addendum).

In March 1946, "the functions of the War Assets Corporation relative to surplus property" were transferred, by Executive Order, to "War Assets Administration"; so likewise were "all authorizations, commitments or other obligations * * * as a disposal agency" (pp. 22, 26, addendum).

In June and August 1946, the Government's principal disposal agency, "War Assets Administration", made the agreements here involved; and by October 1946, such agency had breached both such agreements.

Both the agency which made and breached the contracts *and* the agency now before this Court (each bearing the name "War Assets Administration") are direct transferees of the "functions" of an *expressly* suable agency, to-wit: *"War Assets Corporation"*. Moreover, the "War Assets Administration" now before this Court, is identified with, and tied to, the same expressly suable agency, to-wit: *"War Assets Corporation"*, by "merger" and "consolidation". Such *"War Assets Corporation"* was at all times expressly suable, both (a) by its charter, and (b) as a subsidiary of Reconstruction Finance Corporation which has always been expressly suable by direct Act of Congress.

The "War Assets Administration", which is the defendant herein, succeeded to and assumed the "functions" of the "War Assets Administration" which made and breached the agreements with plaintiffs in 1946, each acting at the time as principal United States Government agency for disposal of surplus goods. These two agencies have been such principal disposal agencies from March 1946 to date.

In July 1947, "the functions" of War Assets Administration" (established by Executive Order in January 1946) were transferred by Congressional Reorganization Plan, to "Surplus Property Administration" which, by the same act, had its name changed to "War Assets Administration". Such "Surplus Property Administration", created by Congressional Act in 1945, had been "deemed merged into and consolidated with War Assets Administration" in January 1946. Such "War Assets Administration" is the defendant in this action. (Addendum, pp. 23; 22; 21; 22.)

(Data as to legal status of United States disposal agencies is set out in addendum, pages 19-26).

BASIS OF JURISDICTION TO REVIEW

Jurisdiction of this Court is based upon Section 240 of Judicial Code as amended (28 USCA, sec. 347).

THE QUESTION PRESENTED

The only question presented is whether War Assets Administration as now constituted, is suable in the District Court with respect to contract liabilities made and breached during the period between June and October 1946 by War Assets Administration as constituted at that time.

REASONS FOR ALLOWANCE OF WRIT

1. Importance of the Question.

The question is one of immediate importance in Federal law in view of the rapid growth of the business activities of the Government. It is of importance both to the Government and to those dealing with its many commercial agencies.

The rapid expansion of business activities of the Federal Government has fanned the fires of dissatisfaction

which have long smouldered over the doctrine of governmental immunity from suit.[1]

Probably no rule of law, not even that of *Swift vs. Tyson*,[2] has been the target of such searching and often epithetic criticism. Maitland calls it "metaphysical nonsense,"[3] and attributes it to the "parsonification"[4] of the King by Blackstone and other worshippers at the shrine of the divine right of kings. Others have credited it to the Austinian theory of sovereignty.[5] Mr. Justice Frank-

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[1] Maguire, State Liability for Tort (1916), 30 Harvard L.Rev. 20; 34: "Many commercial activities make the state a business competitor with its own citizens. In business, our law has always sought to provide a fair field and no favor."; 38: "There is a tendency blindly to follow out-worn rules. But more administrative activity has compelled a keener interest in the problem of administrative responsibility. This interest must soon be reflected by judicial opinion. We may well anticipate rapid and interesting developments within the next few years."; Block, Suits against Government Officers and the Sovereign Immunity Doctrine, 59 Harvard L.Rev. 1060, 1061 (1946); Borchard, Governmental Liability in Tort, 34 Yale L.J. 1, 18; 129-143; 229-258; Borchard, Governmental Responsibility in Tort (1928), 28 Columbia L.Rev. 576, 590, 594; Uhl, United States—Government Corporations—Immunity from Suit (1939), 37 Michigan L.Rev. 1166, 1168; 41 Columbia L. Rev. (1941) 1236, 1246; Wallcup, Immunity of the State from Suit by its Citizens—Toward a More Enlightened Concept (1948), 36 Georgetown L.J. 310-35, 542, 584; 30 Minn. L.Rev. (1946) 185, 202; 34 Yale L.J. 1, 2, 18; 1-45; 129-143; 229-258 (1924) "Government Liability in Tort" by Edwin M. Borchard; 35 Yale L.J. 150, 153 (1925) "Sovereign Immunity—The Modern Trend" by Ernest Angell; 36 Yale L.J. 757, 758 (1927) "Governmental Responsibility in Tort" by Edwin M. Borchard.

[2] 16 Pet. 1 (1842), overruled by Erie Ry. Co. v. Tompkins, 304 U. S. 64 (1938).

[3] 3 Collected Papers 249.

[4] See 30 Harvard L.R. 20, 31.

[5] Kawananakoa v. Polyblank, 205 U.S. 349, 353, criticised by Laski, The Responsibility of the State in England, 32 Harvard L.Rev. 447, 464; by Borchard, Governmental Responsibility in Tort, 36 Yale L.J. 757, 759; by Zane, A Legal Heresy, 13 Ill. L.Rev. 431, 434: "* * * All that these men [authorities cited to support the immunity doctrine] intended to assert was either that the ruler was not affected by private laws not applicable to the monarchical head of the state, or that no legislator or legislative body could bind his or its successor."

furter condemned the doctrine as "without moral validity," and an "anachronistic survival of monarchial privilege."[6] It certainly has no place in a republic in which the executive, judicial and legislative powers are divided.[7]

The tenuousness of the justification for the rule has been particularly disturbing to the courts in cases involving property rights and business contracts. It is natural that this should be so because in other systems of law the Government is suable with respect to its property and commercial transactions.[8]

Justice Learned Hand reflected the growing judicial dissatisfaction with the rule when he said:

> "It is in general highly desirable that, in entering upon *industrial and commercial ventures,* the governmental agencies used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed. The *immunity of the sovereign may well become a serious injustice to the citizen,* if it can be claimed in the

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[6] Kennecott Copper Corp. v. State Tax Com. (1945) 327 U.S. 573, 580.

[7] Maguire, op. cit., 30 Harvard L.Rev. 20; Borchard, op. cit., 34 Yale L.J. 1, 4; 36 Yale L.J. 17; Block, 59 Harvard L.Rev. 1060; 1061: "Various reasons • • • have no application in this country • • • the passage of time has sapped the strength from Mr. Justice Holmes explanation"; "refutation of both the logic and the practicality".

[8] Vattel, Law of Nations, Book 2, Sec. 213, cited and quoted by Mr. Justice Storey in U. S. v. Wilder, 3 Sumn. 308, 28 Fed. Case, p. 601: "The promises, the conventions, all the private contracts of the sovereigns, are naturally subject to the same rules as those of private persons. If any difficulties arise on the subject, it is equally conformable to the rules of decorum, to that delicacy of sentiment which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. And such indeed is the practice of all civilized states that are governed by settled laws." See also: Borchard, "Government Liability in Tort", 34 Yale Law Journal 18, 36 Yale Law Journal 5.

multitude of cases arising from governmental activities which are increasing so fast."[9]

In England, with what Professor Laski calls the English "genius for illogical mitigation", relief through the Petition of Right was arbitrarily enlarged so as to be applicable not merely to the recovery of property, but also for other wrongs committed by the sovereign against his subjects.[10]

In the United States, the limited relief of damages has been made available in certain cases by the Court of

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[9] Gould Coupler Co. v. U. S. Shipping Bd. Corp. (1919) 261 Fed. 716, 718. See also: Bank of U. S. v. Planters Bank (1824, Marshall, J.) 9 Wheat. 904, 907: "It is, we think, a *sound principle*, that when a *government* becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and *takes the character which belongs* to its associates, and *to the business which is to be transacted.*"; Federal Sugar Ref. Co. v. U. S. Sugar Bd. (Dist. 1920; Mayer, J.) 268 Fed. 575, 587: "It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a *trading corporation*, and the ability to sue, and *yet be itself immune* from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign."

Standard Oil Co. of Cal. v. U. S. et al. (Dist. Cal. 1945) 59 Fed. Supp. 100: "When the Government enters the field of commercial activities a liberal approach will be taken to the question of immunity from suit * * *".

Walling v. McCracken Co. Peach Growers Assn. (1943) 50 Fed. Supp. 900: "The Supreme Court has in recent years materially limited the scope of the rule [of sovereign immunity] relied upon where its application was sought in a case involving an agency of the Government."

Pennell v. HOLC (Dist. Me. 1937) 21 F. Supp. 497-499; The No. 34 (Dist. Mass. 1925) 11 F. 2d 287; Rosenberg Bros. & Co. v. U. S. Shipping Bd. etc. (Dist. Cal.) 295 F. 372, 380; Casper v. Regional Agr. Credit Corp. (Minn. 1938) 278 N.W. 896, 898.

[10] Laski, op. cit., 32 Harvard L.Rev. 447, 449, 456.

Claims and the Tucker Act. However, in cases such as this, in which the injury cannot be compensated by damages, the "illogical mitigation" has resulted in judicial evasion of the rule, causing a "state of incongruity and confusion unique in history".[11]

In an effort to evade the immunity rule, courts have resorted to the colorable device of imposing individual liability on the government agent. In *United States v. Lee,* 106 U.S. 196, the United States in effect was ejected from the possession of the Arlington Cemetery through the device of an action in ejectment against its officers who asserted no title of their own.

One year later the same Court, admitting the confusion in its own decisions, denied the right to sue certain officers of the State of Georgia, allegedly in the wrongful possession of the Macon and Brunswick Railroad Company. In the majority opinion, Mr. Justice Miller attempted to distinguish the decision in *United States vs. Lee,* but the substantial identity of the two cases was forcibly pointed out in the dissenting opinion of Mr. Justice Harlan.[12]

There is further illogic in distinction between the extent of the liability of a municipal corporation, which is in effect a department of a State, and of those departments of the State which perform functions of the central government. Indeed, Chief Justice Jay, in the celebrated case of *Chisholm vs. Georgia,* 2 Dallas 419, 472, used the

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[11] Borchard, op. cit., 34 Yale L.J. 1, 4; Brooks v. Dewar et al, (1941) 313 U.S. 354, 359: "As this Court remarked nearly sixty years ago respecting questions of this kind, they 'have rarely been free from difficulty, and it is *not 'an easy matter to reconcile all the decisions of the court in this class of cases'*. The statement applies with equal force at this day."

[12] Cunningham v. Macon R.R. Co., (1883) 109 U.S. 446, 452, 461.

conceded liability to suit of the municipal corporation to establish the liability of the State as a whole.

The dissatisfaction with the rule is not confined to the unfortunate victims of arbitrary action by governmental officers.[13] With the expansion of the Government in commercial activities, its officers have recognized that, in order to make provident contracts, they must behave and be treated like business men, with the right to sue and to be subject to suit. This was the underlying theme of an article by David E. Lilienthal of the Tennessee Valley Authority, and Robert H. Marquis,[14] in which they attempted to draw up a blueprint for a governmental business enterprise, and in the course of which they said:

> "Further, the ability of a Government enterprise to enter into firm commitments is dependent on the applicability to it of the ordinary legal procedures which private businesses follow in their contractual and other relations. Where the Government engages in business activity, existence of those same relationships is essential, since protection of private rights requires amenability of the agency to suit, while the efficient conduct of its affairs similarly necessitates a correlative right on the part of the agency to sue and make settlements. Recognition of this fact has led the courts in some instances to imply a corporate capacity to sue and be sued, even in the absence of specific legislative enactment."

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[13]—sometimes approaching the venal; see Fulton Iron Company vs. Larson as War Assets Administrator and Surplus Property Administrator, — F. 2d — (10/13/48), in which the United States Circuit Court of Appeals for the District of Columbia said: "The transactions involved in this case are surrounded by a pervasive and most offensive odor of skull-duggery."

[14] The Conduct of Business Enterprises by the Federal Government, 54 Harvard L.Rev. 545, 568; cf. 596: " * * recent *sharp contraction* of the doctrine of intergovernmental immunity from taxation."

In the same vein Professor Laski said:

> "The Crown must do business and it must obey the rules that business men have laid down for their governance if it desires effective dealings with them."[15]

Joseph D. Block, writing in 59 Harvard Law Review, 1060, 1080 (1946), also calls attention to the continuing "expansion of governmental activities" and insists that the time has come to abandon all empty fictions as to governmental immunity from suit so as to—

> "* * * leave the way open for the application of the immunity doctrine in accordance with its fundamental purpose—the prevention of undue interference with the operations of Government."

The problems discussed by these and other writers[16] on the subject are squarely presented by this case. The activities of War Assets Administration are entirely commercial in nature. Its transactions involve business agreements running into billions of dollars. Its ability to make agreements is affected by the decision of the Court of Appeals, holding that its agreements are unenforceable against the agency except in the Court of Claims.

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[15] Op. cit., 32 Harvard L.Rev. 447, 466.

[16] 36 Georgetown Law Journal 310-335; 542-87 (1948) "Immunity of the State from Suit by its Citizens—Toward a More Enlightened Concept" by Homer Allen Wallcup.

41 Columbia Law Review 1236 (1941).

34 Yale Law Journal 1-45; 129-143; 229-258 (1924) "Government Liability in Tort" by Edwin M. Borchard.

35 Yale Law Journal 150 (1925) "Sovereign Immunity—The Modern Trend" by Ernest Angell.

36 Yale Law Journal 757 (1927) "Governmental Responsibility in Tort" by Edwin M. Borchard.

30 Minnesota Law Review 185 (1946).

Conscious of "the present climate of opinion which has brought governmental immunity from suit into disfavor", this Court has declared that "a steadily growing policy of governmental liability" should be given "hospitable scope".[17] Recent decisions of this Court have been guided by that philosophy.

Thus in *Keifer and Keifer vs. Reconstruction Finance Corp.*[18] the Court held that a subsidiary corporation created by Reconstruction Finance Corporation was subject to suit. Such agency was held amenable to suit (1) because Reconstruction Finance Corporation, its creator, was subject to suit; (2) because of its "functions and affiliations" and its performance of certain of the functions for which Reconstruction Finance Corporation was created; and (3) because, in view of the Congressional attitude in creation of Governmental agencies, judicial implication of an immunity where none was provided would be "to infer congressional idiosyncrasy".[19]

In *Federal Housing Administration vs. Burr,*[20] the Court held that when a governmental corporation is subject to suit it is subject to all kinds of suit including garnishment. In *Reconstruction Finance Corp. vs. Menihan Corporation,*[21] the Court held that a governmental agency subject to suit is liable for costs as any other liti-

[17] Keifer and Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 390, 396; Reconstruction Finance Corporation v. Menihan Corporation (1941) 312 U.S. 81, 84: "* * * 'because the doctrine [of the *exceptional* freedom of the United States from legal responsibility] gives the government a privileged position, it has been *appropriately confined.*'"

[18] 306 U.S. 381 (1939).

[19] 306 U.S. 381, 393. This decision is contrary to the philosophy of Schillinger v. U. S., 155 U.S. 163, and U. S. v. Michel, 282 U.S. 656, requiring strict construction of all waivers of immunity.

[20] 309 U.S. 242 (1940).

[21] 312 U.S. 81 (1941).

gant. The opinions in both these cases stress the philosophy of the Keifer Case.

In the case at bar, the defendant, War Assets Administration, succeeded to the functions and duties of War Assets Corporation in the disposal of certain kinds of surplus governmental property. (R. 22). The predecessor, War Assets Corporation, was subject to suit by its charter. (R. 24) To attribute to Congress an intent that the new agency, War Assets Administration, should enjoy an immunity from suit denied to its predecessor, although the two agencies were created to carry out the same function, is to infer a "congressional idiosyncrasy" of the same character which this Court condemned in the Keifer Case.

Further applying the language of the Keifer Case, the two agencies in the case at bar—War Assets Corporation and War Assets Administration—are "not relevantly different". As between such agencies there should be no "legal differentiation where policy justifies none". Any such differentiation would be based upon "irrelevant procedural factors", and would involve "imputation of caprice" on the part of the Congress.

The breach of contract here involved does not present any question of government policy. There is nothing to distinguish the contract or its breach from the business dealings of an ordinary citizen. The suit cannot unduly interfere with the operations of the Government.

The case is therefore a challenge to the Court to put an end to a notion about immunity which, as Edwin M. Borchard notes in 34 Yale Law Journal 2, "has survived merely by reason of its antiquity" and now has only historical significance.

2. Probable Conflict with Applicable Decisions of This Court.

The Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court. Certainly the Court of Appeals has failed to give any consideration to the basis for this Court's decision in the following and other cases:

Keifer & Keifer vs. Reconstruction Finance Corporation (1939), 306 U. S. 381, 388, 392-4, 396;

Federal Housing Administration vs. Burr (1940), 309 U.S. 242, 245;

Reconstruction Finance Corporation vs. Menihan Corporation (1941), 312 U.S. 81, 83-85;

Penn Dairies vs. Milk Control Comm., (1943), 318 U.S. 261, 271;

as is clear even from fragmentary quotations from the opinions of this court:

"* * * Immunity in the case of a governmental agency is not presumed;"

—Menihan Case, p. 84.

"* * * being unable to find that Congress had intended immunity from suit, we denied it;"

—Menihan Case, p. 84.

"* * * there is no presumption that the agent is clothed with sovereign immunity;"

—Menihan Case, p. 85.

"* * * the mere fact that it is an agency of the Government does not extend to it the immunity of the sovereign;"

—Menihan Case, p. 83.

"* * * the Government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work;"

—Keifer Case, p. 388.

"* * * we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require;"

—Penn Dairies Case, p. 271.

"The genesis, functions and affiliations of Regional all negative the assumption that in its operations it was to be without the law."

—Keifer Case, p. 392.

Contrary to this Court's statements, the Court of Appeals decision in effect holds that:

—the mere status of War Assets Administration as a governmental agency rendered it immune from suit;

—all governmental agencies, commercial and otherwise, are presumed to be immune from suit; and such presumption cannot be overthrown except by direct Act of Congress;

—the 'genesis, functions and affiliations' of War Assets Administration, and its work as a commercial enterprise, and its status as transferee of 'functions' from an expressly suable agency, were all immaterial;

—there is no presumption that a government commercial agency is amenable to suit.

The decision of the Court of Appeals is contrary to the interpretation of these cases by the lower courts:

Walling vs. McCracken Co., (Dist. Ky. 1943), 50 Fed. Supp. 900;

Standard Oil Co. v. U. S., (Dist. Cal. 1945), 59 Fed. Supp. 100, 105;

Ferguson vs. Nat. Bank (C.C.A. 4th, 1942), 126 Fed. (2d) 753, 756;

Union Nat. Bank vs. McDonald, (Dist. W. Va. 1940), 36 Fed. Supp. 46.

Even in the District Court for the Northern District of Illinois, Eastern Division, War Assets Administration was held to be suable, under similar circumstances, by another District Judge—*Scott Steel Co. vs. War Assets Administration,* (Oct. 10, 1947) Case No. 47 C 1199.

The Circuit Court of Appeals decision only adds to the confusion which Joseph Block describes in his article in 59 *Harvard Law Review,* p. 1060 (1946):

> "That this has been a problem of plaguing proportions is well demonstrated by the multitude of cases on the point, by the disharmony apparent in the decisions of those cases, and by the legal fictions invoked by the courts to aid them in reaching their results."

CONCLUSION

We think that the reasoning of the Keifer Case is controlling here, but an important tribunal, the Court of Appeals for the 7th Circuit, disagreed with our contentions. The consequence is that a question of Federal law, important to the public and to the Government, is unsettled. The case affords an opportunity to the Court to definitely set the boundaries of governmental immunity. It is a challenge to the Court to repudiate a rule which has no historical justification in English law, which was inapplicable to the form of government adopted in the

United States, and which is entirely without moral or political justification.

This Court has said that "the expanding conceptions of public morality regarding governmental responsibility should not be subordinated" to "historical accidents".[22] Now, in the case at bar, those standards of "public morality" are in issue for practical recognition by this Court.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, for the Seventh Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case, which was entitled in that Court: "United States Circuit Court of Appeals, For the Seventh Circuit; *A. F. Wagner Iron Works and Wagner Engineering Co., Plaintiffs-Appellants vs. War Assets Administration; Otto Klein, Regional Director for General Disposal of Chicago Regional Office of War Assets Administration; and R. F. Going, Deputy Regional Director for General Disposal of Chicago Regional Office of War Assets Administration, Defendants-Appellees;* No. 9624, Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division", to the end that said cause may be reviewed and determined by this Court as provided by law; and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate; and that the said judgment in the

[22] 306 U.S. 381 (1939).

said Circuit Court of Appeals may be reversed by this Honorable Court.

A. F. WAGNER IRON WORKS,
a Wisconsin Corporation, and

WAGNER ENGINEERING CO.,
a Wisconsin Corporation,

Petitioners.

By Their Attorneys,

HAROLD W. NORMAN,

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ADDENDUM

FEDERAL SURPLUS PROPERTY DISPOSAL AGENCIES (1944 - 1948)

Chronological list of statutes, executive orders, and regulations creating and affecting the principal agencies exercising the Federal surplus property disposal functions from February 1944 to June 1948. **Bold face** indicates an agency which is expressly suable.

Date	Disposal Agency; transfer terms
2/19/44 Exec. Ord. #9425 under First War Powers Act 12/28/41; 50 USCA App., sec. 601, 9 F.R. 2071	Surplus War Property Administration (and Surplus War Property Administrator, in Office of War Mobilization); also to "a subsidiary of **Reconstruction Finance Corporation"** created pursuant to sec. 5d(3) of Reconstruction Finance Act —"All functions, powers, and duties relating to the transfer or disposition of surplus war property, heretofore conferred by law on any government agency may, to the extent necessary to carry out the provisions of this order, be exercised also by the (Surplus War Property) Administration."
5/8/44 Reg. of S.W.P.A.; 9 F.R. 5096	**Reconstruction Finance Corporation** —"There is hereby assigned to Reconstruction Finance Corporation for disposition . . .

(2) such personal property . . . as are reported as surplus to Reconstruction Finance Corporation by the owning agency . . . in conjunction with the plant or other real property..."

5/29/44 Reg. of S.W.P.A.; 9 F. R. 12069

Reconstruction Finance Corporation

—"All surplus war property of whatsoever nature located in Alaska is hereby assigned to the Reconstruction Finance Corporation for disposal . . ."

7/26/44 Reg. of S.W.P.A.; 9 F.R. 9182

Reconstruction Finance Corporation

—". . . termination inventory property . . . may be reported to . . . Reconstruction Finance Corporation . . ."

10/3/44 Stat.; Surplus Property Act of 1944; 50 USCA App., sec. 1615

Surplus Property Board

—". . . shall have general supervision and direction . . . over (1) the care and handling and disposition of surplus property . . . "

4/6/45 Reg. of S.P.B.; 10 F.R. 3764

Reconstruction Finance Corporation

—"designated" by Surplus Property Board as "the disposal agency for capital and producer's goods".

—see also 10/19/45 and 11/10/45, below.

9/18/45 Stat.; Am. to Surplus Property Act of 1944; 50 USCA App., sec.1614a and 1614b, suppl.	Surplus Property Administration (with a Surplus Property Administrator, in Office of War Mobilization & Reconversion) —Transferee of functions of Surplus Property Board. —See also 7/1/47 below.
10/19/45 Exec. Ord. #9643; 10 F.R. 13039; See 50 USCA App., sec. 603, supp.	**Reconstruction Finance Corporation** —Transferee of Commerce Dept. surplus property disposal functions.
11/10/45 Reg. of S.P.A.; 10 F.R. 14064	**Reconstruction Finance Corporation** —"designated" by Surplus Property Administration as "the disposal agency for capital and producers' goods".
1/15/46 Reg. of S.P.A.; 11 F.R. 408	**War Assets Corporation** —"designated as the disposal agency for all types of property for which the Reconstruction Finance Corporation is now the disposal agency and shall exercise the functions and discharge the duties and responsibilities heretofore assigned to the Reconstruction Finance Corporation with respect to the disposal of property".

1/31/46
Exec. Ord.
#9689;
11 F.R. 1265,
50 USCA App.,
sec. 1614a,
supp.

War Assets Corporation (Chairman of Board of Directors of War Assets Corporation.)
—transferee of "functions" of Surplus Property Administration, which is "deemed merged into and consolidated with the War Assets Corporation".

3/25/46
Exec. Ord.
#9689;
50 USCA App.,
sec. 1614a,
supp. note

War Assets Administration
—in the Office for Emergency Management of the Executive Office of the President, headed by a War Assets Administrator.

—transferee of *"the functions of the War Assets Corporation relative to surplus property* and of the Chairman of the Board of Directors of the War Assets Corporation relative to surplus property"; and also of *"all authorizations, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation"*.

—*"All authorizations, commitments or other obligations incurred by War Assets Corporation as a disposal agency* under the Surplus Property Act of 1944, as amended, were transferred, effective March 25, 1946, to War Assets Administration created by Executive Order No.

9869, and its remaining assets and liabilities have been taken over by its parent, Reconstruction Finance Corporation".

—7/19/46 War Assets Administrator "designated" "War Assets Administration as the disposal agency for all other property".

7/1/47
Reorg.
Plan, sec.
501; 50
USCA App.,
sec. 1614a

Surplus Property Administration (and Surplus Property Administrator)

—transferee of "functions of the War Assets Administration and of the War Assets Administrator established by Executive Order No. 9689 of January 31, 1946".

—thereupon name changed to:

War Assets Administration (and War Assets Administrator)

—and "the agencies established by Exec. Ord. No. 9689 are abolished"; "functions" to be "performed by the War Assets Administrator or, subject to his direction and control, by such officers and agencies of the War Assets Administration as he may designate".

RECONSTRUCTION FINANCE CORPORATION and WAR ASSETS ADMINISTRATION —Suability Provisions

Reconstruction Finance Corporation:

Title 15 USCA, sec. 601 (1/22/32)
"There is hereby created a body corporate with the name Reconstruction Finance Corporation."

Title 15 USCA, sec. 604 (1/22/32)
". . . It (Reconstruction Finance Corporation) shall have power . . . *to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal;* . . . "

Title 15 USCA, sec. 603 (6/30/47)
"(a) . . . It (Reconstruction Finance Corporation) shall have power . . . *to sue and be sued,* to complain and to defend, in any court of competent jurisdiction, State or Federal; . . ."

War Assets Corporation: (formerly known as Petroleum Reserves Corporation)

6/30/43 Charter: "Petroleum Reserves Corporation" created by Reconstruction Finance Corporation; charter provides "the corporation shall have the power and authority . . . *to sue and be sued;* . . . " (8 Fed. Reg., p. 9044, July 2, 1943: Chapter I—Reconstruction Finance Corporation. Charter of Petroleum Reserves Corporation)

7/15/43 " . . . the Petroleum Reserve (sic) Corporation . . . and their *functions,* powers and duties, *together with* the *functions,* powers, and duties *of* the *Reconstruction Finance Corporation are transferred to* the *Office of Economic Warfare.* All . . . property . . . contracts, assets, liabilities . . . of these corporations, together with so much of the . . . property of Reconstruction Finance

Corporation used in the administration of these corporations as the Director of the Budget shall determine, are transferred with these corporations to the Office of Economic Warfare for use in connection with the exercise and performance of its functions, powers, and duties . . ." (Exec. Ord. # 9361; 50 USCA App., sec. 601, pp. 230-1)

9/25/43 Transfer of "functions" of Office of Economic Warfare (together with the corporations, agencies, and functions transferred thereto by Executive Order No. 9361 of July 15, 1943) ". . . and their respective functions, powers, and duties are transferred to and consolidated in" the Foreign Economic Administration (in the Office of Emergency Management of the Executive Office of the President), "for use in connection with the exercise and performance of its functions, powers, and duties . . . " (Exec. Ord. # 9380; 50 USCA App., sec. 601, p. 232)

9/27/45 *Transfer* of "the Petroleum Reserves Corporation . . . and their *functions* . . . assets, and liabilities" to Reconstruction Finance Corporation. (Exec. Ord. # 9630; 50 USCA App., sec. 601, Supp. p. 101)

11/9/45 Name changed from "Petroleum Reserves Corporation" to "War Assets Corporation" (RFC Charter Am.; 10 Fed. Reg. p. 14059. 11/15/45)

1/15/46 "War Assets Corporation" designated as "Disposal Agency for RFC Property" (Reg.; 11 Fed. Reg. 408—1/9/46)

1/31/46 *Functions* of "Surplus Property Administration" transferred to "War Assets Corporation (Exec. Ord. # 9689; 50 U.S.C.A. App., sec. 1614a, Supp. p. 438)

3/25/46 "All authorizations, commitments or other obligations incurred by War Assets Corporation as a disposal agency . . . transferred . . . to War Assets Administration" (Cert.; 11 Fed. Reg. 7718)

6/30/46 Dissolution of War Assets Corporation (Cert.; 11 Fed. Reg. 7718)

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 391

A. F. WAGNER IRON WORKS AND WAGNER ENGINEERING CO., PETITIONERS

v.

WAR ASSETS ADMINISTRATION, ET AL., ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither the District Court for the Northern District of Illinois nor the Court of Appeals for the Seventh Circuit filed a written opinion. The District Court's finding of fact, conclusion of law, and order vacating the temporary restraining order and denying petitioners' motion for a preliminary injunction appear in the Record at

pages 17-18. The order of the Court of Appeals denying petitioners' motion in that court for a preliminary injunction, affirming the judgment of the District Court, and remanding the cause with directions to dismiss the bill of complaint, appears in the Record at pages 27-28.

JURISDICTION

The order of affirmance of the Court of Appeals was entered on August 5, 1948 (R. 27). The petition for a writ of certiorari was filed on November 1, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether by reason of the fact that it succeeded to the functions relative to surplus property of the War Assets Corporation, a suable Government corporation, the War Assets Administration, a non-corporate and nonsuable branch of the Executive Department, is subject to suit for specific performance of a contract for the sale of a quantity of steel which was surplus property of the United States.[1]

EXECUTIVE ORDER INVOLVED

The pertinent provisions of Executive Order No. 9689, 11 F. R. 1265, 3 C. F. R., 1946 Supp.,

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[1] This is the sole question raised by the petition (Pet. p. 5). No question is raised by petitioners in respect of any denial of independent relief against the two individually named respondents, Klein and Going.

pp. 93-94, establishing the War Assets Administration and transferring to it the functions of the War Assets Corporation relative to surplus property, are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

This is a suit against the War Assets Administration and two of its officers, Otto Klein and R. F. Going, for an injunction and for specific performance of an alleged contract for the sale of steel plates which were surplus property of the United States (R. 1-8B). This case was heard before the District Court on petitioners' application for a temporary injunction, which was denied. The facts alleged in the complaint are substantially as follows:

Petitioners are both Wisconsin corporations and allege that the War Assets Administration is an agency of the United States Government amenable to suit. The contract on which petitioners rely was for the sale of 5,000 tons of annealed steel plates located at the War Assets Administration Warehouse No. 12 in Milwaukee, Wisconsin, at a price of $35.00 per ton (R. 3). The date of the contract is not set out, although there is an allegation that, pursuant to the contract, petitioners executed and delivered purchase orders for the steel on June 8, 1946, copies thereof being annexed to the complaint as Exhibits A and B (R. 3, 8A, 8B). This contract was repudiated on August 6, 1946, by respondent R. F.

Going, Deputy Regional Director for General Disposal of the Chicago Regional Office of War Assets Administration, who refused to deliver the steel to petitioners (R. 3-4). At the same time the then Chicago Regional Director, Fred A. McLaughlan, predecessor in office of respondent Otto Klein, agreed to deliver an equal amount of other steel substantially similar in quality, and thereafter representatives of the petitioners and of the Chicago Office selected approximately 1,500 tons of such substitute steel (R. 4-5). Before delivery was made, Regional Director McLaughlan was replaced by respondent Otto Klein, who demanded the payment of $7 per ton more than the contract price of $35 per ton, for the substitute steel, to which demand petitioners were compelled to accede by reason of their commitments and their inability to obtain such steel elsewhere (R. 5). After the 1,500 tons of steel were delivered, petitioners were notified by the Chicago Office of the War Assets Administration that no further deliveries would be made (R. 5).

Petitioners alleged that under the quota system set up by steel manufacturers because of the steel shortage, they have been unable to obtain steel to use in operating manufacturing facilities acquired by them after the quota system went into effect, and that they are thus dependent upon the fulfillment of their contract with the War Assets Administration to obtain sufficient steel to operate

these additional facilities economically and efficiently (R. 5-6). They alleged that there was on hand for disposal at the War Assets Administration Warehouse No. 9 in Milwaukee more than 1,300 tons of steel satisfactory to them as "substitute steel" under the terms of the agreement of August 6, 1946, that by reason of this agreement the petitioners have a superior claim to this steel, and that they are ready, able and willing to make payment therefor in accordance with that agreement (R. 6). It was further alleged that all funds received by the Administration are deposited forthwith to the credit of the United States so that the Administration has no funds subject to its own control and disbursement, that the damages sustained by petitioners "are difficult to reasonably and definitely determine," and that petitioner will sustain irreparable damage unless the sale of the steel on hand in Warehouse No. 9 is enjoined and a judgment for specific performance issued directing the sale and delivery to them of such steel in accordance with the agreements made (R. 7).

Petitioners prayed the issuance of a temporary order restraining the disposition of the steel in Warehouse No. 9, a preliminary injunction enjoining the disposal of this steel to any person or corporation other than petitioners pending the determination of this action, for a permanent injunction, and for a judgment for specific per-

formance directing respondents to sell and deliver to petitioners the steel on hand in Warehouse No. 9, together with approximately 3,500 tons of other similar "substitute steel" which was in the Chicago region and subject to disposal by the Administration (R. 7-8).

A temporary restraining order was issued by the United States District Court for the Northern District of Illinois on May 18, 1948, upon the filing of the complaint (R. 10-12). On May 24, 1948, the District Court entered an order, which was stayed for 24 hours, denying petitioners' motion for a "preliminary" injunction and vacating the temporary restraining order previously entered (R. 17). A similar order, omitting the provision for a stay, was entered by the District Court on the following day, accompanied by a finding of fact that "Defendant, War Assets Administration is an agency of the United States" and a conclusion of law that "Defendants are not sueable [sic] in the District Court of the United States, and this court does not have jurisdiction of this cause" (R. 17-18). Notice of appeal was filed the same day, and by agreement of the parties the restraining order was extended in effect to June 1, 1948 (R. 18). On May 27, 1948, petitioners filed a motion for a temporary injunction in the United States Court of Appeals for the Seventh Circuit (R. 24-26). At the argument of this motion it was agreed by counsel that the

submission of the cause on the motion for an injunction should constitute a submission on the appeal, and the Court of Appeals, after denying the motion for a temporary injunction on May 28, 1948, entered an order on August 5, 1948, affirming the judgment of the District Court and remanding the cause with directions to dismiss the bill of complaint (R. 26-28).

ARGUMENT

Because the War Assets Administration succeeded to the functions relative to surplus property of the War Assets Corporation, a Government corporation which by the terms of its charter could sue and be sued,[2] petitioners contend that the War Assets Administration is also subject to suit (Pet. 3-5, 13). Otherwise stated, it is petitioners' contention that the transfer of a particular governmental function from a suable agency to a nonsuable agency indicates a Congressional intention

[2] The War Assets Corporation (originally the Petroleum Reserves Corporation) was a corporation chartered by the Reconstruction Finance Corporation, with the power to sue and be sued expressly granted to it. 8 F. R. 9044; 10 F. R. 14059. By regulation of the Surplus Property Administration the War Assets Corporation became the disposal agency for all types of property for which R. F. C. had been the disposal agency, which included capital and producers' goods. 10 F. R. 14064; 11 F. R. 408. The establishment of the War Assets Administration in the Office of Emergency Management in the Executive Office of the President and the transfer to it of the functions of the War Assets Corporation relative to surplus property was effected by Executive Order No. 9689, dated January 31, 1946, 11 F. R. 1265, 3 C. F. R., 1946 Supp., pp. 93-94, as amended by Executive Order No. 9707, dated March 23, 1946, 11 F. R. 3149, 3 C. F. R., 1946 Supp., pp. 114-115. See Appendix, infra, pp. 14-16.

to waive the latter's sovereign immunity from suit as to that function.[3] Not only does this contention find no support in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, upon which petitioners principally rely, but it has also been specifically rejected by this Court on similar facts in *United States* v. *Shaw*, 309 U. S. 495, 505.

This Court's decision in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, is clearly distinguishable from the case at bar. There the question was whether a Regional Agricultural Credit Corporation, chartered by R.F.C., pursuant to Congressional authority, was immune from suit as an instrumentality of the Federal Government, where neither the statute nor the charter contained any express provision as to suability. After pointing out that in establishing at least forty other corporations to discharge governmental functions, Congress uniformly had included the authority to sue and be sued, the Court held that Congress did not intend to create an exception to this general policy, but "* * * naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow auto-

[3] The alleged contract was not executed until after the transfer to the War Assets Administration of the functions relative to surplus property, so that this petition does not present the question as to whether the War Assets Administration is subject to suit on a contract entered into by the War Assets Corporation.

matically to the Regionals from the source of their being." 306 U. S. at 393.

Unlike the Regional Agricultural Credit Corporation, War Assets Administration is an unincorporated agency of the Government and bears none of the features of a government corporation with a legal entity separate from that of the United States. Cf. *United States* v. *Remund,* 330 U. S. 539, 541. The Congressional policy to make government corporations subject to suit is, therefore, irrelevant as to the War Assets Administration, which is an integral part of the governmental mechanism. While it is true that the rule of strict construction of a waiver of sovereign immunity is not applied by this Court in actions involving government corporations,[4] that rule has not been relaxed in actions against the Government itself. *United States* v. *Sherwood,* 312 U. S. 584, 586, 590; *United States* v. *Shaw,* 309 U. S. 495, 501-502. There being, moreover, no limitation on the power to withdraw the privilege of suing the United States or its instrumentalities (*Lynch* v. *United States,* 292 U. S. 571, 581-582; see *Maricopa County* v. *Valley Bank,* 318 U. S. 357, 362), we submit that the decisions of this Court on which petitioners rely do not justify the inference of a waiver of sovereign immunity merely because the Govern-

[4] As in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381; *Federal Housing Administration* v. *Burr,* 309 U. S. 242; and *Reconstruction Finance Corp.* v. *Menihan Corp.,* 312 U. S. 81, upon which petitioners rely (Pet. 12, 14).

ment transfers to one of its constituent units a function which was for a time performed by a suable government corporation.

In *United States* v. *Shaw,* 309 U. S. 495, the United States, which had taken over the assets of the United States Shipping Board Emergency Fleet Corporation (a Government corporation with the power to sue and be sued), obtained a judgment against a contractor with the Corporation, and after the contractor's death filed a claim on the judgment in the state probate court having charge of his estate. The administrator was permitted to set off a claim of the estate against the Government and, since it was for an amount in excess of the Government's claim, a judgment thereafter was entered for the balance due the estate, over the Government's objection that by filing a claim it had not subjected itself to a binding, though not immediately enforceable, determination of its liability on a cross-claim. In this Court one of the arguments advanced by the administrator in support of the judgment was that the United States had waived its sovereign immunity when it took possession of the assets of its agent, the Fleet Corporation, prior to the institution of the action and later, while the action was pending, by statute had assumed the Corporation's obligations. In reversing the judgment this Court summarily rejected this contention, saying that it could " * * * see nothing in these transactions

which indicates an intention to waive the immunity of the United States in the state courts." *United States* v. *Shaw*, 309 U. S. 495, at 505. We submit that this conclusion is equally applicable to the Government's immunity in the federal courts and is, therefore, dispositive of petitioners' contention that the transfer of functions from the War Assets Corporation to the War Assets Administration was a waiver of the Government's immunity from suit.

Apparently in recognition of the unsoundness of their argument that there has been a waiver here of the Government's immunity from suit, petitioners quite frankly present this case as a challenge to the Court to repudiate the doctrine of sovereign immunity [5] (Pet. 13, 16-17). However, petitioners cannot complain that the application of the doctrine here leaves them without a remedy, as they can bring an action for breach of their alleged contract either in the District Court under 28 U. S. C. 1346(2) or in the Court of Claims under 28 U. S. C. 1491(4). Even against a private person such an action for money damages is the only remedy ordinarily available, since the equitable

[5] As to petitioners' argument that "The suit cannot unduly interfere with the operations of the Government" (Pet. 13), cf. *Jess Larson, as War Assets Administrator and Surplus Property Administrator* v. *Domestic and Foreign Commerce Corporation*, No. 31, this Term, in which for more than a year and a half the War Assets Administration has been prevented by injunction from disposing of 10,000 tons of coal, pending the final determination of what is, in effect, an action for specific performance for sale of the coal.

remedy of specific performance can be had only in unusual circumstances. The fact that petitioners are asking the Court to require the delivery of specified lots of steel "* * * together with approximately 3500 tons of other similar steel or so-called 'substitute steel' * * * which is in said Chicago region and subject to disposal by [the War Assets] Administration * * *" (R. 8), without any further description or identification of this "other similar steel," demonstrates that the terms of the alleged contract are so uncertain as to much of the subject matter that an attempt to enforce specific performance would be impractical. Cf. *Gulbenkian* v. *Gulbenkian*, 147 F. 2d 173, 175 (C. A. 2); *Cincinnati Underwriters A. Co.* v. *Thomas J. Emery Memorial*, 88 F. 2d 506, 508 (C. A. 6), certiorari denied, 302 U. S. 696. We submit, therefore, that even if this Court could repudiate the doctrine of sovereign immunity, there is no element of hardship in the case at bar which would justify uprooting a doctrine so deeply imbedded in our law.

CONCLUSION

The judgment of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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DECEMBER, 1948.

APPENDIX

Executive Order No. 9689, dated January 31, 1946, 11 F. R. 1265, 3 C. F. R., 1946 Supp., pp. 93-94, provides in pertinent part:

CONSOLIDATION OF SURPLUS PROPERTY FUNCTIONS

Whereas the Surplus Property Administration has now substantially completed the performance of its policy-making functions, the War Assets Corporation is now vested with the major part of domestic surplus property disposal, and the State Department is now vested with the major part of foreign surplus property disposal; and

Whereas, after a reasonable period in which to make necessary administrative arrangements, it will be feasible and desirable to establish a War Assets Administration as a separate agency directly responsible to the President to exercise consolidated functions relating to the disposal of domestic surplus property;

Now therefore, by virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby ordered as follows:

1. The functions of the Surplus Property Administrator and of the Surplus Property Administration are hereby transferred, ex-

cept as otherwise provided herein, to the chairman of the board of directors of the War Assets Corporation, and to the War Assets Corporation, respectively, and the Surplus Property Administration shall be deemed merged into and consolidated with the War Assets Corporation.

2. All functions of the Surplus Property Administrator and the Surplus Property Administration which relate to surplus property located outside the continental United States, Hawaii, Alaska (including the Aleutian Islands), Puerto Rico, and the Virgin Islands are transferred to the Secretary of State and the Department of State, respectively.

3. Effective March 25, 1946 (a) there shall be established, in the Office for Emergency Management of the Executive Office of the President, a War Assets Administration at the head of which there shall be a War Assets Administrator, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of $12,000 per annum unless the Congress shall otherwise provide, and (b) the functions of the War Assets Corporation relative to surplus property and of the chairman of the board of directors of the War Assets Corporation relative to surplus property shall be transferred to the War Assets Administrator.

4. There shall be transferred to the agencies to which functions are transferred by this order so much as the Director of the Bureau of the Budget shall determine to relate primarily to such functions, respectively, of the records, administrative property, personnel, and funds of the Surplus Property Administration, the Office of War Mobilization and Reconversion, the Reconstruction Finance Corporation, and the War Assets Corporation. All authorizations, commitments, or other obligations incurred as a disposal agency by the Reconstruction Finance Corporation or by the War Assets Corporation under the Surplus Property Act of 1944 shall be transferred to the War Assets Administration upon its establishment.

* * * * *

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